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In the Supreme Court of the United States

OCTOBER TERM, 1941

CLAUDE R. WICKARD, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL., APPELLANTS

v.

ROSCOE C. FILBURN

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF FOR THE APPELLANTS

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OPINION BELOW

The opinion of the District Court (R. 108) is not yet reported.

JURISDICTION

The final judgment of the District Court was entered on March 25, 1942 (R. 124). A petition for appeal was filed and allowed on the same day (R. 125). Jurisdiction is conferred on this Court by Section 3 of the Act of August 24, 1937 (50 Stat. 752, 28 U. S. C. Sec. 380a). Probable jurisdiction was noted on March 30, 1942 (R. 129).

QUESTIONS PRESENTED

1. Whether application to appellee's 1941 wheat crop of the penalty provisions of the amendment of May 26, 1941, to the Agricultural Adjustment Act of 1938, deprived appellee of property without due process of law because that crop was planted and almost ready for harvest before the amendment was passed.

2. Whether the amendment of May 26, 1941, was made invalid, as applied to appellee's 1941 crop, by the failure of the Secretary of Agriculture to mention in a speech on May 19, 1941, that the amendment would provide increased penalties for wheat available for marketing in excess of quotas.

3. Whether the referendum on wheat marketing quotas held on May 31, 1941, was inoperative to make quotas enforceable according to the provisions of the amendment of May 26, 1941, because of the Secretary's speech and because the referendum followed the passage of the amendment by only five days.

4. Whether the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938, as amended on May 26, 1941, are within the commerce power of Congress.

5. Whether this action may be maintained against the appellants other than the Secretary of Agriculture.

STATUTE INVOLVED

The statute involved is the Agricultural Adjustment Act of 1938 (52 Stat. 31, 7 U. S. C. § 1281

et seq.), as amended (52 Stat. 202, 54 Stat. 727, 1211, 7 U. S. C. § 1301; 52 Stat. 820, 7 U. S. C. § 1302; 52 Stat. 203, 775, 53 Stat. 1125, 1126, 54 Stat. 232, 7 U. S. C. §§ 1333, 1334, 1335; Pub. No. 74, 384, 77th Cong., 7 U. S. C. A. § 1340). A compilation of relevant statutory provisions will be handed to the Court at the argument.

STATEMENT

1. THE PROCEEDINGS

This is an appeal from a judgment of a statutory three-judge court convened pursuant to Section 3 of the Act of August 24, 1937 (50 Stat. 752, 28 U. S. C. § 380a) (R. 9, 124). Appellants are the Secretary of Agriculture of the United States, three members of the County Agricultural Conservation Committee for Montgomery County, Ohio, and a member of the State Agricultural Conservation Committee for Ohio (R. 125). The action was commenced by a complaint filed by the appellee on July 14, 1941 (R. 1), in which he sought, as a producer of wheat, to enjoin enforcement against him of the marketing penalty imposed by the amendment of May 26, 1941 (Pub. No. 74, 77th Cong., 7 U. S. C. A. § 1340), upon that part of his 1941 crop which was available for marketing in excess of the marketing quota established for his farm (R. 8). Appellee also sought a declaratory judgment that the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938, as amended, were an unconstitutional ex-

ercise of the commerce power and in violation of the due process clause of the Fifth Amendment (R. 4–9).

The Secretary moved to dismiss the action against him for improper venue, and the other appellants moved to dismiss the complaint on the grounds that they had no power or authority to enforce the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938, as amended, that authority to enforce such provisions was vested exclusively in the Secretary, and that the granting of the Secretary's motion to dismiss for improper venue would result in the absence of an indispensable party to the case (R. 10–11). On January 22, 1942, the Secretary waived his objection to the venue (R. 11) and filed an answer (R. 12). The motion of the other appellants was denied on March 25, 1942 (R. 103), and on the same day they filed their answer, reserving their exceptions to the overruling of their motion to dismiss (R 104).

The case was tried on the pleadings and upon stipulated evidence (R. 16), which included proclamations, orders, and regulations issued by the Secretary of Agriculture with reference to acreage allotments and the marketing of the 1941 wheat crop (R. 16–18, 100–101), a radio speech delivered by the Secretary on May 19, 1941 (R. 20–28), and numerous exhibits relating to interstate and foreign commerce in wheat (R. 28–99).

The judgment of the court below, entered on March 25, 1942, permanently enjoined appellants from collecting a marketing penalty of more than 15 cents a bushel on the farm marketing excess of appellee's 1941 wheat crop, from subjecting appellee's entire 1941 crop to a lien for the payment of such penalty, and from collecting a 15 cent penalty except in accordance with the provisions of Section 339 of the Act (52 Stat. 55, 7 U. S. C. § 1339), as that section stood prior to the amendment of May 26, 1941 (7 U. S. C. A. § 1340) (R. 124).

2. PROVISIONS OF THE AGRICULTURAL ADJUSTMENT ACT OF 1938, AS AMENDED

The purpose, among others, of the Agricultural Adjustment Act of 1938, as amended, is to regulate the volume of wheat moving in interstate and foreign commerce in order to obviate excess surpluses and shortages and prevent the abnormally low, and abnormally high, wheat prices that result from such surpluses and shortages (Sec. 331, 52 Stat. 52, 7 U. S. C. § 1331). Section 332 of the Act directs the Secretary to ascertain and proclaim each year a national acreage allotment for the next crop of wheat (52 Stat. 53, 7 U. S. C. § 1332). This allotment must be an acreage that normally produces an amount of wheat which, when added to the carry-over, will equal a normal year's domestic consumption and exports plus 30 per centum thereof; but in no case may the allotment fall below 55,000,000 acres (Sec. 333, 52 Stat. 53, 775, 53 Stat.

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1125, 7 U. S. C. § 1333). The national acreage allotment is apportioned to states, counties, and farms according to the provisions of Section 334 of the Act (52 Stat. 53, 203, 7 U. S. C. § 1334) and regulations issued thereunder by the Secretary. Loans and payments are authorized to wheat farmers who cooperate in a program based upon such allotments (7 U. S. C. A. §§ 1302, 1303, 1340).

Section 335 (a) provides that, whenever it appears that the total supply of wheat as of the beginning of any marketing year will exceed a normal year's domestic consumption and exports by more than 35 per centum, the Secretary shall, not later than May 15 prior to the beginning of such marketing year, proclaim such fact and, during such marketing year, beginning July 1, a compulsory national marketing quota shall be in effect with respect to the marketing of wheat (52 Stat. 54, 7 U. S. C. § 1335 (a)). Between the issuance of such proclamation, however, and June 10, the Secretary must conduct a referendum of farmers who will be subject to the quota to determine whether they favor or oppose it, and if more than one-third of the farmers voting in the referendum oppose the quota, the Secretary must, prior to the effective date of the quota, by proclamation suspend its operation (Sec. 336, 52 Stat. 55, 7 U. S. C. § 1336). If the quota is approved, marketing quotas for each farm are determined according to the provisions of the amendment of May 26, 1941 (Pub.

No. 74, 77th Cong., 7 U. S. C. A. § 1340). The amendment also prescribes the method of ascertaining the farm marketing excess of wheat produced by a non-cooperating farmer, which may not be marketed except under penalty, and provides that such a farmer may avoid payment of any penalty by storing his farm marketing excess or by delivering it to the Secretary. The Secretary is also authorized by the amendment to issue regulations governing such storage and delivery.

3. CHANGES MADE BY THE AMENDMENT OF MAY 26, 1941

The original Act provided that the Secretary should specify in his proclamation the amount of the national marketing quota in terms of a total quantity of wheat and also in terms of a marketing percentage of the national acreage allotment for the current crop that would produce the amount of the national marketing quota (52 Stat. 54, 7 U. S. C. Sec. 1335). The effect of this requirement, upon apportionment of the quota among individual farms, would have been to restrict farmers, including cooperators, to marketing only a portion of the normal production of their acreage allotments (52 Stat. 54, 7 U. S. C. Sec. 1335). In July 1939 the Act was amended to make the quota for any farm the normal or the actual production of the acreage allotment, whichever was larger, plus any carryover wheat that the farmer could have marketed without penalty in the preceding marketing year (53 Stat. 1126, 7 U. S. C. Sec. 1335). The Act

prior to the amendment of May 26, 1941, also prescribed that any farmer who, while quotas were in effect, marketed wheat in excess of the quota for the farm on which it was produced should be subject to a penalty of 15 cents a bushel on the excess so marketed (52 Stat. 55, 7 U. S. C. Sec. 1339).[1]

By the amendment of May 26, 1941, the foregoing quota and penalty provisions were again changed (Pub. No. 74, 77th Cong., 1st Sess., 7 U. S. C. A. Sec. 1340). The quota for each farm became the actual production of the acreage planted to wheat less the normal or the actual production, whichever was smaller, of any excess acreage.[2] Wheat in excess of this quota, known as the "farm marketing excess" and declared by the amendment to be "regarded as available for marketing" (par. (3)), is subject to a penalty, and the whole crop of the non-cooperating farmer is subject to a lien for the payment of the penalty. The lien may be removed and the penalty avoided, however, by

[1] Section 301 (b) (6) of the Act of 1938 defined marketing as meaning "sale, barter, or exchange" (52 Stat. 40); the amendment of July 2, 1940 (54 Stat. 727), extended the definition to include feeding to commercial poultry and livestock.

[2] By a subsequent amendment of December 26, 1941 (Pub. No. 384, 77th Cong., 1st Sess.), it was provided that "the farm marketing excess for any crop of wheat for any farm shall not be larger than the amount by which the actual production of such crop of wheat on the farm exceeds the normal production of the farm wheat-acreage allotment, if the producer establishes such actual production to the satisfaction of the Secretary."

storing the farm marketing excess or delivering it to the Secretary. The penalty was fixed at 50% of the basic rate of the loan on wheat authorized to be extended to cooperators, which, by paragraph (10) (a), was increased to 85% of the parity price.[3] In 1940, when the penalty was 15¢ a bushel, the basic loan rate for cooperating farmers was 64¢ a bushel;[4] by virtue of the amendment, the loan for the 1941 crop was increased to 98¢ and the penalty to 49¢, the increase in each case being exactly 34¢ (R. 71). The loan rate constitutes, in effect, a guaranteed minimum return.[5]

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[3] The Act had previously provided that loans would be made under certain circumstances at rates between 52% and 75% of the parity price. (Sec. 302 (b).) Both the original and amended statutes declared that no loans should be made if farmers disapproved of marketing quotas in the referendum provided for. (Sec. 302 (g), 7 U. S. C. Sec. 1302 (g); Act of May 26, 1941, par. (10), 7 U. S. C. A., Sec. 1340 (10).) Under the 1941 amendment, loans were to be made only to cooperators, except that non-cooperators could obtain loans at 60% of the rate for cooperators on so much of the commodity as would be subject to penalty if marketed.

[4] See United States Department of Agriculture press release, May 20, 1940.

[5] The loans authorized by the Act are mandatory; the wheat is security for the loan, but the producer is not personally or otherwise liable except in the case of fraud. (Sec. 302 (b) (h), 7 U. S. C. § 1302 (b) (h), 52 Stat. 43, 44.) If the farmer sells the wheat upon which the loan is made for a sum greater than the amount of the loan, he is entitled to keep the difference, but the farmer is not personally liable for any deficiency if the wheat should be sold for less than the amount of the loan (*ibid.*).

Pursuant to this statutory authority the Secretary issued regulations for the administration of wheat marketing quotas for the 1941 crop (R. 18). These regulations covered, in part, the storage of the farm marketing excess and authorized the issuance of marketing cards both to cooperating farmers who had no marketing excess and to non-cooperating farmers who paid the penalty or disposed of their farm marketing excess in compliance with the amendment of May 26, 1941, and the Secretary's regulations. The regulations also provided that wheat not covered by a marketing card issued to the producer was to be taken by the buyer as subject to the marketing penalty and the lien thereon.

4. APPLICATION OF THE ACT TO APPELLEE'S 1941 CROP

Appellee owns and operates a farm in Montgomery County, Ohio, on which he produces winter wheat (R. 2, 18). It is his practice to dispose of each crop in part by sale, in part by feeding grain to poultry and livestock which (or the products of which) are in part sold and in part consumed on the farm, by grinding some of the wheat into flour for home consumption, and by using a part of the grain as seed for the next crop (R. 19).

During the period from 1938 to 1940 no marketing quotas for wheat were in effect. On May 9, 1941, however, the Secretary found, in accordance with Section 335 of the Act, that the total supply of wheat as of July 1, 1941, would exceed a normal

year's domestic consumption and exports by more than 35% and proclaimed a national marketing quota for the marketing year 1941–1942 (R. 17). The quota was approved in a referendum held on May 31, 1941, pursuant to Section 336, in which, according to the Secretary's finding, 81 percent of the 559,630 votes cast were in favor of the quota (R. 17).

On May 13, 1940, approximately a year before the national wheat marketing quota for the 1941 crop was proclaimed, the Secretary had announced, pursuant to Sections 332 and 333 of the Act, as amended, that the national acreage allotment for the 1941 wheat crop was 62,000,000 acres (R. 100). Through the appellant County Committee appellee received notice in July 1940, before planting his 1941 crop, that the allotment for his farm was 11.1 acres and that the normal yield was 20.1 bushels an acre (R. 18–19). Appellee, however, planted 23 acres of winter wheat in the fall of 1940, from which he harvested in July 1941, subsequent to the proclamation and approval of a national marketing quota, approximately 462 bushels of wheat (R. 3, 119). His farm marketing excess was 239 bushels (R. 19). Appellee was notified of his acreage allotment and normal yield a second time in July 1941, just prior to harvest (R. 19). Appellee refused to store his excess wheat, deliver it to the Secretary, or pay the prescribed penalty. In consequence, no marketing card was issued to him (R. 19), and, upon the sale of any

part of his crop, the buyer would be required to pay the marketing penalty, with a right to deduct the amount thereof from the purchase price. (Act of May 26, 1941, par. (8).)

5. THE NATURE OF THE WHEAT INDUSTRY

Interstate commerce.—The stipulated record contains a "Statement of Economic Data of the Wheat Industry" (R. 28–99). This shows the states (R. 35–48) and nations (R. 32) in which wheat is grown and the dependence of the South and East upon the western states for most of their bread grain supplies (R. 29). The vast extent of the interstate and foreign movements of wheat and flour is amply demonstrated (R. 49–66). Indeed, no other grain has the importance of wheat in interstate commerce (R. 49).

Marketing and Distribution of Wheat.—Wheat farmers sell all of the wheat which they produce except that needed for seed, feed, and food on the farm. The value of the wheat sold in 1940 was $424,770,000, or 78 percent of the total (R. 53, 61). During the five-year period, 1931–32 to 1935–36, the average production of wheat in the United States was 680,603,000 bushels. The distribution of the total production was as follows: wheat sold from the farm, 484,673,000 bushels; wheat fed on the farm where grown, 107,608,000 bushels; wheat used as seed on the farm where grown, 72,567,000 bushels; and wheat used in the farm household, 15,755,000 bushels (R. 60). For the 17-year period,

1923–24 to 1939–40, the total amount of wheat used for seed averaged 83 million bushels, varying from a low of 73 million bushels in 1939–40 to a high of 97 million bushels in 1936–37. During the same period, the amount of wheat fed to livestock on farms where grown averaged 86 million bushels, varying from 28 million bushels in 1925–26 to 174 million bushels in 1931–32 (R. 68, 71, 78, 79).

The manner in which wheat is distributed is described in some detail at R. 49–54. Most farmers in the United States market their wheat to local country elevators, although, in some areas, a substantial amount of wheat is sold to trucker-buyers. Some wheat is consigned to terminals, and, in some areas, small amounts of wheat are sold through local feed stores. Farmers usually retain sufficient wheat for seeding, for feed for their poultry or livestock, and some for grinding for their household use. This diversified disposition of the farm production of wheat and the various methods of marketing make it difficult accurately to account for the actual amount, as well as the final disposition, of an individual farmer's wheat production. (R. 49–50.)

There are over 30,000 local elevators, some operated by local independent grain dealers, some by farmers' cooperative associations, and others by large grain firms with headquarters in cities having terminal markets. These country elevators have a small amount of storage capacity and, consequently, must handle the grain as rapidly as possible with shipment to mills or terminal elevators

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scattered throughout the country near large mills and wheat exporting ports. It has been estimated that considerably over a million grain cars are used for this purpose during each year. After buying the wheat from a farmer, the operator of the country elevator usually sells the wheat as soon as possible to elevators or mills or consigns it to a commission merchant for sale, usually through a Board of Trade. There are large terminal markets in numerous cities (R. 50).

Approximately 500,000,000 bushels of wheat are ground each year in the United States by about 4,000 mills. The flour reaches the consumer as the product of about 35,000 bakeries or through about 350,000 retail grocery stores. Because of the development of specialized flour requirements, commercial millers must have access to, and must purchase, wheat of the various classes and physical qualities to enable them to cater to all classes of trade. This results in the blending of wheat of the various classes and of widely scattered origins. (R. 51.)

The effect of an excessive supply of wheat upon interstate commerce is graphically indicated by the congestion which results in transportation and storage facilities. In 1922 and 1929 the excessive supply clogged terminal markets and railroad sidings for miles around and forced the railroads to refuse to transport additional wheat and local elevators to place an embargo upon the receipt of wheat from farmers (H. Rep. No. 1645, 75th Cong.,

2d Sess., pp. 29–30). "In connection with the abnormally large supply of wheat and other grains for the 1941–42 marketing year [the year involved in this case], congestion has occurred in a number of markets, necessitating steps which have interrupted the regular flow of grain to those points. * * * * Because of the tight storage situation at a number of markets, partial embargoes have been instituted to prevent further congestion and the tying up of railroad cars vitally needed in the defense effort" (R. 51).

Wheat Supply, Demand, and Price.—The inelasticity of demand for wheat causes changes in the supply materially to affect the price. The balance between supply and demand means fair prices to the farmer and the consumer. A supply substantially in excess of the demand, plus a reasonable reserve, means ruinous prices to the farmer (R. 67). The human consumption of wheat in the United States is subject to less variation than that of most commodities, due largely to the importance of bread in the diet and the relatively inelastic demand for it. The amount of wheat used for seed is also fairly constant, while that used for livestock feed fluctuates widely with changes in livestock prices and in the relation between the prices of alternative feeds and the price of wheat. There is also a marked increase in the feeding of wheat to livestock in years in which large quantities of low-grade wheat are produced (R. 68, 78, 80).

A large world supply means a low world price, and a small world supply results in a high world

price (R. 67, 72, 73). The production of wheat in one part of the world affects the market for wheat produced in other countries (R. 67, 74). The trend of world production has been upward since 1923 (R. 67, 76, 77). World wheat prices declined in the period 1924 to 1933 with the increase in world supplies (R. 68, 72, 73). The sharp decline in prices after 1929 was caused, in part, also by the general decline in industrial activity and commodity prices. There was a movement upward in world wheat prices from the spring of 1933 to the summer of 1937 reflecting world-wide recovery from depression, currency depreciation, and reduced production. In 1938, world prices again declined sharply as a result of a record world production. In 1940-41, large supplies in surplus producing countries and reduced trade held world wheat prices to low levels. (R. 68, 69.)

In the absence of Government wheat programs, the price of wheat in the United States is generally closely related to the world wheat price (R. 69, 75). Domestic wheat prices up to 1933 followed in general the trend of world wheat prices, but from the spring of 1933 to the spring of 1937, domestic prices were unusually high in relation to world prices, as the result of small crops in the United States. In 1937, the production in the United States was large and prices declined. In 1938, with domestic production again large, accompanied by a record world crop and somewhat lower commodity prices generally, prices again de-

clined and would have declined still further except for the United States loan and export-subsidy programs. Prices received by growers during 1939 and 1940 were generally higher than in 1938, largely as a result of a more complete operation of the program of federal assistance to wheat farmers. (R. 69.)

The income to wheat farmers in 1939, 1940, and 1941 has been greatly increased as a result of agricultural programs in effect during such years (R. 99). These programs consist of price supporting loans, conservation and parity payments, crop insurance, and the limited use of an export subsidy program (R. 97). If the 1941 crop of wheat were sold on the basis of world prices, farmers would probably receive only about 40 cents per bushel (R. 71). The loan rate of 98 cents per bushel for the 1941 crop of wheat has resulted in much higher wheat prices to all producers of wheat (R. 98).

Governmental Aid to Wheat Producers in Other Countries.—The extent of the production of wheat and the important influence of wheat upon the agricultural economy of many countries has resulted in governmental intervention and aid. This intervention has been more pronounced with respect to wheat than any other agricultural commodity. The general purpose of intervention has been to protect the domestic prices received by wheat producers. Many countries, particularly wheat importing countries, have sought in recent years to become more self-sufficient. Various measures were

adopted for the purpose of increasing their own production of wheat. These devices included import quotas or licenses, higher import duties, limitations of the amount of imported wheat for mixture with domestic wheat for the manufacture of flour, foreign exchange control, fixed or guaranteed minimum prices, and Government operated monopolies of the wheat trade. The operation of these measures resulted in an increased production of wheat in the importing countries and lessened the demand for wheat grown in exporting countries in excess of their domestic needs (R. 91).

The four large exporting countries, namely, Argentina, Australia, Canada, and the United States, were, in consequence of the actions of importing countries, forced to adopt governmental programs for bringing relief to their wheat growers because of abnormally excessive supplies. These measures have included subsidy payments to growers, guaranteed minimum prices, export bounties, currency depreciation, and barter or other preferential trade agreements. The steps taken by these countries, as in importing countries, have generally evolved toward government control, though in varying degrees depending upon the individual country's situation and problems. The exporting countries have also taken the initiative in discussions tending to result in an international wheat agreement by means of which the international trade in wheat may be increased and apportioned on an equitable and "fair price" basis (R. 93).

6. OPINION, FINDINGS, AND DECREE OF THE COURT BELOW

The court below filed findings of fact and conclusions of law (R. 118). In addition to the facts already mentioned, the court found that a radio speech delivered by the Secretary of Agriculture on May 19, 1941, in which he urged wheat farmers to vote for quotas in the referendum of May 31, 1941, misled appellee and other farmers who had planted wheat in excess of their acreage allotments because the Secretary failed to state that the amendment of May 26, 1941, provided for an increase in the penalty and subjected the entire crop of the non-cooperating wheat farmer to a lien for the payment of the penalty (R. 121–122).

The court held that the penalty and other enforcement provisions of the May 1941 amendment, as applied to appellee's 1941 wheat crop, were retroactive legislation in violation of the due process clause of the Fifth Amendment or, in the alternative, that the Secretary's misleading speech and the fact that only five days intervened between the amendment of May 26 and the referendum of May 31 rendered inequitable the application of the increased penalty and the lien provision of the amendment to appellee's 1941 crop (R. 108–112, 122–123). The court also held that appellants other than the Secretary of Agriculture were proper parties (R. 123). In view of its rulings on due process and the equities of the case, the court stated that it was "unnecessary to pass on the other ques-

tion raised by the plaintiff's bill of complaint" (R. 112). Appellants were enjoined from enforcing the quota provisions against appellee except in accordance with Section 339 of the Act (52 Stat. 55, 7 U. S. C. § 1339) as in effect prior to the amendment of May 26, 1941 (R. 124).

Circuit Judge Allen dissented from the finding with respect to the Secretary's speech and from all the conclusions of law (R. 123), and in a dissenting opinion (R. 113) supported the Act and the amendment of May 26, 1941, as a constitutional regulation of commerce, not violative of due process, and not inequitable as applied to appellee's 1941 crop.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

1. In holding invalid the wheat marketing quota provisions of the amendment of May 26, 1941, in so far as they subjected appellee's farm marketing excess of wheat from the 1941 crop, when such excess became available for marketing, to a marketing penalty of 49 cents a bushel computed under said amendment.

2. In holding that the increase in the penalty and the lien provision contained in the amendment of May 26, 1941, were retroactive legislation denying to appellee due process of law when applied to his 1941 crop, which had been planted prior to the effective date of the aforesaid provisions.

3. In holding that application of the enforcement provisions of the May 1941 amendment to appellee's 1941 crop was inequitable by reason of

the Secretary's speech on May 19, 1941, and circumstances surrounding the holding of the referendum on May 31.

4. In holding that the action might be maintained against appellants other than the Secretary of Agriculture.

SUMMARY OF ARGUMENT

I

A. Appellee had notice of his acreage allotment, on which his quota was based, before his 1941 crop was planted. After planting but before the wheat was harvested or marketed, quotas were definitely made operative for the 1941 crop, and the penalties for excess wheat available for marketing were increased by the amendment of May 26, 1941. Since the amendment's restrictions did not apply until after the harvesting of the crop, it was not being applied retroactively or in violation of due process. *Mulford* v. *Smith*, 307 U. S. 38.

B. A radio speech by the Secretary of Agriculture on May 19, 1941, in which he failed to mention the increase in penalties under the amendment approved on May 26, 1941, did not render the amendment unconstitutional or make the referendum of May 31 inoperative. The speech, which was misconstrued by the court below, was not in any way misleading, and there was no occasion for the Secretary to refer in it to the penalty provisions of the new amendment. But even if such were not the case, the speech would not have invalidated the

statute or justified going behind the result of the referendum to inquire into the factors which influenced the voters. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533. Nor was the court warranted in holding the referendum inoperative because it was held only five days after the amendment increasing the penalties was passed. The court plainly erred in disregarding the language of the statute because of its view that the Secretary's speech and the short time between the amendment and the referendum caused the "equities of the case" to "favor the plaintiff."

II

The marketing quota and penalty provisions are a valid exercise of the commerce power. Similar provisions for tobacco were sustained in *Mulford* v. *Smith*, 307 U. S. 38. The fact that the penalty applies to excess wheat which is available for marketing, although actually it may be consumed on the farm as feed, seed or household food, does not convert the regulation from one of marketing to one of production or make it invalid. Because of the relationship of such wheat to the national price and supply, Congress reasonably concluded that orderly interstate marketing and reasonable interstate prices could best be achieved if the quota system applied to all wheat available for marketing and not merely to that actually sold.

In addition, the method of regulation adopted was chosen because of the practical difficulties in the way of enforcement of a system limited to wheat

sold. The task of checking up on all sales by over a million wheat producers would have been well-nigh impossible. Under the present plan enforcement is feasible because it is necessary only to know the amount of wheat acreage planted by the farmer and the normal yield per acre. Congress is entitled to choose the means which it deems appropriate and necessary to the effective carrying out of its policy of keeping excess wheat off the interstate market.

That the wheat quota plan does not regulate production appears from the provision for storage of excess wheat without penalty. But even if the Act were regarded as a regulation of production, it would not be invalid. The amount of wheat produced undoubtedly has a substantial and direct effect upon the amount shipped and upon price; and control of the amount produced would plainly be a reasonable means of exercising the power of Congress over the quantity of wheat shipped in interstate commerce and its price. Cf. *United States* v. *Darby*, 312 U. S. 100; *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1.

III

The action may not be maintained against the appellants who are members of the county and state committees. They have no power to enforce the law or otherwise injure appellee. There is no basis for the granting of equitable relief against them, nor, indeed, any case or controversy in the constitutional sense.

ARGUMENT

I

APPLICATION OF THE INCREASED PENALTIES PRESCRIBED BY THE AMENDMENT OF MAY 26, 1941, TO APPELLEE'S 1941 CROP IS NOT UNLAWFUL

A. THE ACT WAS NOT RETROACTIVELY APPLIED; *MULFORD* v. *SMITH* IS DIRECTLY IN POINT

Appellee's 1941 crop was planted in the fall of 1940, before the amendment of May 26, 1941, was passed and before the wheat marketing quotas for 1941 became operative. Appellee contends that the application of the marketing quota provisions, and in particular, of the increased penalties prescribed in the amendment of May 26, 1941, to his 1941 crop gives the statute retroactive effect in violation of the due process clause. This argument is completely answered by the decision of this Court in *Mulford* v. *Smith*, 307 U. S. 38.

A mere statement of the facts will make this obvious. In July of 1940 a wheat acreage allotment of 11.1 acres and a normal yield of 20.1 bushels an acre for the 1941 crop were established for appellee's farm in accordance with the provisions of the Act, and notice thereof was given the appellee prior to the planting of his 1941 crop (R. 18). Despite this fact appellee sowed 23 acres of wheat in the fall of 1940 for harvest in July 1941 (R. 19). On May 9, 1941, prior to the beginning of the marketing year for the 1941 crop, the Secretary of Agriculture proclaimed that the total sup-

ply of wheat as of the beginning of the marketing year July 1, 1941–June 30, 1942, would exceed a normal year's domestic consumption and exports by more than 35 percent, and thereupon, by virtue of the provisions of Section 335 of the Act, a national marketing quota was in effect for the 1941 crop of wheat (R. 17–18). Although in prior years the total supply of wheat had not been such as to bring wheat marketing quotas into effect, the Act had been in effect since 1938 and the appellee knew, or should have known, at the time he planted his 1941 crop of wheat, that the total supply of wheat as of July 1, 1941, might be such as to bring a national marketing quota into effect with the result that the appellee would have to comply with a quota based on his acreage allotment previously established.

The Act, as in effect at the time appellee planted his crop, provided that in the event marketing quotas should become effective a penalty of 15¢ per bushel was to be paid on all wheat marketed * from his farm in excess of the marketing quota for the farm. On May 26, 1941, the amendment increasing the penalty on the farm marketing excess of wheat to 49¢ per bushel, but at the same time increasing the guaranteed loan rate (see p. 9, *supra*), became effective. Thereafter, on May 31, 1941, in accordance with the provisions of Section 336 of the Act, a referendum was held in which 81 percent of the

* For the definition of marketing, see page 8, n. 1, *supra*.

farmers participating voted in favor of quotas (R. 17). In July of 1941, prior to the time at which the appellee harvested his crop, he was again informed of the amount of his acreage allotment and normal yield and was informed also of the amount of his farm marketing excess and of the enforcement provisions of the Act. Despite this fact, appellee refused to store, turn over to the Secretary, or pay a penalty on his excess wheat and under the provisions of the Act he was, therefore, unable to sell any of his wheat without deduction of the applicable penalty by the buyer from the purchase price (R. 19).

The majority of the court below held that because appellee's wheat was planted and almost ready for harvest at the time the amendment providing for increased penalties was passed, the amendment amounted to retroactive legislation in violation of the due process clause.

This holding plainly is inconsistent with the decision of this Court in *Mulford* v. *Smith*, 307 U. S. 38. There the Act had been approved and a quota for tobacco had been proclaimed in February 1938. The required referendum was held in March, regulations for the fixing of farm quotas were issued in June, and shortly before the auction markets opened in August the growers received notice of their individual quotas. Prior to the time when the Act was approved and the quota proclaimed in February 1938, the tobacco growers had planted their

seedbeds and prepared their lands for setting out the plants. After the date of the approval of the Act but prior to the time the growers received notice of their quotas, the tobacco had been transplanted, cultivated, harvested, cured, and graded. Until the receipt of the notice of quota, none of the tobacco growers knew or could have known the exact amount of his quota. The contention was made that because of these facts the statute operated retroactively and amounted to a taking of property without due process of law. This Court disposed of the contention as follows (p. 51):

> The argument overlooks the circumstance that the statute operates not on farm production, as the appellants insist, but upon the marketing of their tobacco in interstate commerce. The law, enacted in February, affected the marketing which was to take place about August 1st following, and so was prospective in its operation upon the activity it regulated. The Act did not prevent any producer from holding over the excess tobacco produced, or processing and storing it for sale in a later year; and the circumstance that the producers in Georgia and Florida had not provided facilities for these purposes is not of legal significance.

The same rule applies in this case. The statute here does not operate on production but upon the disposition of the excess wheat which is available for marketing. As applied to wheat not disposed of or marketed when the amendatory act was

passed, it is obviously prospective in its operation. Likewise, it does not prevent any farmer from holding over and storing his excess wheat. It expressly provides that the penalty on the excess may be avoided if such excess is stored. Furthermore, if the excess wheat is stored, the farmer is permitted by the amendment to obtain a loan on such wheat at the rate of 60 percent of the rate of the loan provided for cooperators, and, in a subsequent year, he may market the wheat thus stored, using it to fill his quota if quotas are in effect. Act of May 26, 1941, pars. (3), (4), (6), (8), and (10) (7 U. S. C. A., Sec. 1340, pars. (3), (4), (6), (8), and (10)).

Indeed, it is apparent from a comparison of the facts in the two cases that the position of the appellee here is much weaker than that of the tobacco growers in the *Mulford* case. In that case the Act providing for marketing quotas and penalties had not even been passed at the time the tobacco growers planted their seed beds, and the tobacco had been harvested and cured before the growers received notice of their quotas. Here the Act providing for marketing quotas and penalties had been in existence for over two years before appellee planted his 1941 crop, he had received notice of his acreage allotment and normal yield before such planting, and he also had knowledge more than 30 days before harvest time of his farm marketing excess of wheat and the increased penalties to be

paid on such excess unless it was stored or turned over to the Secretary. Furthermore, the storage of wheat to avoid payment of the marketing penalties is entirely feasible. In the *Mulford* case, on the contrary, the Court took note of the producers' argument that the legal right to store their excess tobacco was of little practical value because of the absence of facilities and held this fact to be without legal significance.

B. THE RADIO SPEECH OF THE SECRETARY OF AGRICULTURE AND THE SHORT TIME ELAPSING BETWEEN THE AMENDMENT OF MAY 26, 1941, AND THE REFERENDUM OF MAY 31, 1941, ARE IMMATERIAL

The court below distinguished the *Mulford* case on the basis of a radio speech by the Secretary of Agriculture on May 19, 1941, and because only five days elapsed between the amendment of May 26, 1941, and the referendum on May 31. It held, in part, that (R. 123):

> The amendment of May 26, 1941, to the wheat marketing quota provisions of the Agricultural Adjustment Act of 1938, in so far as said amendment related to the 1941 crop of wheat, is invalid because of the failure of the Secretary of Agriculture to forewarn wheat farmers, in his radio address made on May 19, 1941, of the increase in the marketing penalty as provided by such amendment.

In addition, although no such issues appeared in the stipulation as to the questions presented for

decision (R. 19–20), alternative grounds of the decision below were "that the equities of the case * * * favor the plaintiff" (R. 112, 122), and that the referendum of May 31 was inoperative to subject the 1941 crop to the amendment of May 26 (R. 123). The latter point would seem to present a question of statutory construction.

We know of no principle by which a court may ignore an admittedly applicable statute in favor of "the equities of the case," unless the inequity is such as to make the statute so arbitrary as to violate the due process clause or some other constitutional provision. Accordingly, we think it necessary only to show that the factors upon which the court relied did not render application of the quota system and the penalty provisions to appellee's 1941 crop either unconstitutional or in contravention of the statute.

1. The Secretary's speech did not invalidate the statute or the referendum

(a) Although the court below held to the contrary, it scarcely seems necessary to argue that a radio speech by an administrative official cannot nullify a law passed by the Congress. For that reason the remainder of this discussion will be restricted to the question of statutory construction.

In answer to the contention that the speech invalidated the referendum of May 31 and thus

prevented compliance with a statutory prerequisite to the establishment of marketing quotas, it is necessary only to refer to this Court's decision in *United States* v. *Rock Royal Co-op.*, 307 U. S. 533. That case involved a similar claim that an allegedly misleading statement by the Department of Agriculture invalidated a referendum under the Agricultural Marketing Agreement Act of 1937. There, it was contended that for such reason an order fixing milk prices should not be enforced. The evidence showed, among other things, that an explanatory pamphlet published by the Department of Agriculture contained statements to the effect that the milk order would require all handlers subject thereto to pay to producers the uniform price established thereunder, whereas, in fact, it was provided in the order, which, with the pamphlet, was circulated among the producers prior to the referendum, that cooperatives otherwise subject to the order as handlers were exempt from this requirement. Furthermore, the pamphlet made no mention of the fact that milk sold outside the marketing area was not subject to the classified prices applicable to milk sold in the marketing area. This Court held the order enforceable, saying (p. 559):

> The Secretary of Agriculture declared that three-fourths of the producers affected by the Order approved its terms. The litigants do not deny that three-fourths of the voters voted for the institution of the Order. There is no authority in the courts to

> go behind this conclusion of the Secretary to inquire into the influences which caused the producers to favor the resolution.

The Court in the *Rock Royal* case assumed that the Department's explanatory pamphlet contained "erroneous statements" (p. 558). Such an assumption, as will be shown, would have no warrant in the case at bar. But in any event it is apparent that the *Rock Royal* case is controlling, and that remarks made during the course of a speech by the Secretary do not invalidate a referendum subsequently held.

(b) There is also no basis for the assumption by the court below that farmers were in any way misled by the Secretary's speech.

In support of its position the court relied on the Secretary's failure to mention the increased penalties contained in the bill subsequently signed by the President on May 26, and on the Secretary's statement that (R. 111):

> Because of the uncertain world situation, we deliberately planted several million extra acres of wheat. * * * Farmers should not be penalized because they have provided insurance against shortages of food.

It is perfectly apparent from the context in which the above language appears, and from the speech as a whole, that, as Circuit Judge Allen, dissenting, declared, the Secretary (R. 113–114) "was speaking of penalties in the form of ruinously low prices which result from an excess sup-

ply of any basic farm commodity. No reference to enforcement provisions of any legislation, new or old, could reasonably be understood to be intended from the reference to low prices as penalties, * * *." Since no summary or paraphrasing of the speech can demonstrate the accuracy of this statement as persuasively as the speech read as a whole, the Court is respectfully referred to the speech itself as set forth at R. 20–28.

The assumption by the majority of the court below that the quoted passage meant that the Secretary had encouraged farmers to plant in excess of their acreage allotments would mean that he had deliberately urged them to disregard the very law he was administering and enforcing. A much more reasonable interpretation of his remarks is that he had established the national acreage allotment for the 1941 crop at a high level in order to avoid a shortage, and that the wheat farmers should not be penalized by the low prices which would result if a quota system was not made operative.

Apart from the speech itself, which we submit proves nothing, the record contains no evidence nor suggestion that the Secretary's remarks misled the farmers voting in the referendum nor, indeed, any other evidence on the subject at all. It cannot be assumed that a short passage in a speech over the radio contained all the information available to

farmers with respect to the May 26 amendment to the statute. The Court is undoubtedly aware of the fact that such a subject would be discussed in local newspapers and farm publications, and that information would be circulated through the wheat-farming communities by employees of the Department of Agriculture, by farmers engaged in administering the farm program, and by others. That this actually occurred is indicated in part by a press release, fully and accurately summarizing the May 26 amendment, which was issued by the Department of Agriculture immediately upon its enactment (see Appendix, *infra*, pp. 61–64).

The court below was particularly disturbed by the Secretary's failure in his speech to call the farmers' attention, in advance of the referendum, to the increased penalties imposed by the new law. But there was no reason why he should have done so. The farmers were not voting on the means by which a quota system was to be made effective, but on whether they approved the establishment of quotas at all. Section 336 of the Act, which provides for the referendum, states merely that the vote shall be taken "to determine whether such farmers favor or oppose such quotas." It was certainly not the intention of Congress that the referendum be held to determine whether the farmers favor a quota system only so long as its penalties are too slight to make the quotas enforceable. The paramount purpose of the Act is to keep off

the market an abnormally excessive supply of wheat, an object which will be accomplished to the extent that farmers comply with the quotas without incurring any penalties. Accordingly, it may reasonably be assumed that the producers favoring quotas were voting for an effective quota system which would protect them against low prices, and not for a plan which would fail because of the inadequacy of the statutory sanctions.

The Secretary of Agriculture found and proclaimed that 81% of the farmers participating in the referendum voted in favor of the quotas. The appellee does not deny this fact. There is no evidence that any producer misunderstood what he was voting for, that the vote of any producer would have been different had the Secretary mentioned the increased penalties in his speech, or that any producer was not fully informed as to the increased penalties provided in the amendment. Certainly on these facts the courts should not go behind the finding of the Secretary. Cf. *United States* v. *Rock Royal Co-op.*, 307 U. S. 533.

2. *The Fact That the Referendum Followed the Amendment by Only Five Days Did Not Render The Referendum Inoperative*

The majority of the court below apparently were of the opinion (R. 111-112) that the passage of only five days between the amendment of May 26 increasing the penalties and the referendum of May

31, 1941, made it inequitable and, therefore, unlawful to apply the penalty provisions of the amendment to the 1941 crop. It seems to have been assumed that, because of the shortness of time between the passage of the amendment and the holding of the referendum, the farmers could not have known of the increased penalties provided in the amendment, and that the vote might have been different if they had known this fact. This view is obviously without merit.

As authority for this conclusion, the majority of the court below relied (R. 111) upon the following statement in the *Mulford* case (p. 46–47):

> In the light of the fact that the appellants received notice of their quotas only a few days before the actual marketing season opened, the maintenance of actions based upon collection of the penalties would have been a practical impossibility. We are of opinion, therefore, that a case is stated for the interposition of a court of equity.

The above passage from the *Mulford* opinion was concerned only with the jurisdiction of the District Court as a court of equity, not with the merits of the case or the equitable nature of the Act or its application. As has been shown (*supra*, pp. 26–29), the Court expressly rejected on the merits the contention that anything unlawful had occurred. Obviously the decision below can find no support in this or any other portion of the *Mulford* opinion.

The error of the court in invalidating the referendum because of the increase in penalties a few days before it was held is shown sufficiently by what we have said in answering the argument as to the Secretary's failure to mention the increased penalties in his radio address (see pp. 30–35, *supra*). In summary, (1) the courts should not go behind the finding of the Secretary that the vote was favorable and inquire into the influences causing the producers to vote favorably (*United States* v. *Rock Royal Co-op.*, 307 U. S. 533); (2) there is no showing that any producer was without knowledge of the amendment or the increased penalties, or that he would have voted differently if he had had greater knowledge, or that he in any way misunderstood what he was voting for; (3) the producers were not voting as to whether penalties should be increased, but only as to whether the marketing quotas should be approved, so that it was immaterial whether they had knowledge of the increased penalties at the time they voted.

II

THE MARKETING QUOTA AND PENALTY PROVISIONS ARE A VALID EXERCISE OF THE COMMERCE POWER

Appellee contends that the marketing quota and penalty provisions of the amendment of May 26, 1941, are not valid regulations of interstate commerce. This question was not passed upon by the

majority of the court below (R. 112).[7] Circuit Judge Allen in her dissenting opinion, however, held the Act to be a valid exercise of the commerce power.

The objects of the statute and the economic facts upon which it rests are set forth in the legislative finding in Section 331. The facts thus found are not challenged and their accuracy is confirmed by the stipulation of facts in the record (R. 28–103). See pp. 12–18, *supra*.

Section 331 states that wheat is a basic source of food produced by more than a million farmers, and that in the form of wheat or flour, it "flows almost entirely through instrumentalities of inter-

[7] Although the majority of the court below stated in the opinion that they deemed it unnecessary to pass upon this question in view of their decision on the other points (R. 112), it is to be noted that the disposition of the case made by the court of necessity is inconsistent with appellee's position that such a regulation is not within the commerce power. The court concluded (R. 123) that a penalty of 15¢ a bushel on appellee's farm marketing excess could be collected in accordance with the provisions of Section 339 of the Act of 1938, as that section was in effect prior to the amendment of May 26, 1941, and ordered (R. 124) that the appellants be enjoined from collecting a penalty greater than this. Section 339 of the Act prior to the amendment required payment of a 15¢ penalty on all wheat "marketed" in excess of the quota; and "marketed," as it was defined in the Act prior to the amendment, meant to dispose of by feeding to poultry and livestock as well as by selling. (Sec. 301 (b) (6), 54 Stat. 727.) Appellee's contention that the amendment regulates production is based on the ground that it subjects to penalties wheat used on the farm, such as that fed to livestock, as well as wheat which is sold.

state and foreign commerce;" that abnormally excessive and deficient supplies of wheat directly affect and burden interstate and foreign commerce; that excessive supplies overtax transportation and milling facilities, depress the price of wheat in interstate and foreign commerce, and disrupt the orderly marketing of wheat in such commerce; that deficient supplies result in an inadequate flow of wheat and its products in interstate and foreign commerce and in excessive increases in the prices of wheat and its products in such commerce; that surpluses result in unreasonably low, and shortages in unreasonably high, prices for wheat; that it is in the interest of the general welfare that interstate and foreign commerce in wheat and its products be protected from such surpluses and shortages, and that an adequate supply for domestic consumption and export be maintained; that without federal assistance the farmers cannot prevent the recurrence of such surpluses and shortages; that the provisions of the Act are necessary to minimize recurring surpluses and shortages, provide for adequate reserve supplies, and maintain an adequate flow of wheat and its products in interstate and foreign commerce; and that the provisions of the Act "for regulation of marketings by producers of wheat whenever an abnormally excessive supply of such commodity exists are necessary in order to maintain an orderly flow of wheat in interstate and foreign commerce under such conditions."

That Congress has the power to fix marketing quotas to accomplish these purposes was expressly held in *Mulford* v. *Smith*, 307 U. S. 38, which sustained the validity of the provisions of this very Act fixing marketing quotas for tobacco.* The findings of Congress as to the purpose of the law as it applies to tobacco are similar to those relating to wheat. In the *Mulford* case this Court said (p. 48):

> Any rule, such as that embodied in the Act, which is intended to foster, protect and conserve that commerce, or to prevent the flow of commerce from working harm to the people of the nation, is within the competence of Congress. Within these limits the exercise of the power, the grant being unlimited in its terms, may lawfully extend to the absolute prohibition of such commerce, and *a fortiori* to limitation of the amount of a given commodity which may be transported in such commerce. The motive of Congress in exerting the power is irrevelant to the validity of the legislation.

The record discloses that, just as was true of tobacco, a large proportion of the wheat produced

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* Farm marketing quotas for tobacco and for cotton have been continuously in effect since the approval of the Act on February 16, 1938, except, in the case of tobacco, for the year 1939. The cotton marketing quota provisions of the Act, which were based on acreage allotments, were held to be within the competence of the Congress under the commerce power in *Troppy* v. *LaSara Farmers Gin Co.*, 113 F. (2d) 350 (C. C. A. 5).

moves through the channels of interstate and foreign commerce (R. 49–66). In 1940, 78 percent of the wheat produced was sold by the farmers (R. 53), and, although figures are unavailable to show precisely the amount, the proportion which moved out of the state of origin was undoubtedly large. Indeed, this Court itself has noted "the flow of wheat from the West to the mills and distributing points of the East and Europe." *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1, 36.

Differences in the mechanics of marketing and in the uses of wheat and tobacco have resulted in differences in the details of the marketing quota systems adopted for the two crops. Practically all tobacco is sold commercially, primarily through a relatively small number of auction markets. On the other hand, a substantial quantity of wheat is consumed on the farm as feed for livestock, as seed, and, to a slight extent, as food. The wheat sold is distributed through a vast number of local elevators,[9] truck-buyers, local feed stores, and terminals (R. 49–50). In the regulation of tobacco it was found necessary, for administrative reasons, to apply marketing quotas to all tobacco, whether distributed and used interstate or intrastate. In the case of wheat, for reasons indicated below, it has similarly been found necessary to apply the quotas to all wheat consumed and distributed, whether interstate or intrastate.

[9] There are over 30,000 such elevators alone (R. 50).

But because the wheat marketing penalty applies to excess wheat which is available for marketing, although it may be actually consumed on the farm, appellee claims that the wheat regulation is one of production and not of marketing and that accordingly the *Mulford* case is inapplicable.

That the wheat quota plan does not control or seek to control the amount planted or produced is apparent from the provisions for the storage of the quantities produced in excess of quotas. A farmer may grow as much as he pleases without penalty, so long as he is willing to store the excess so that it will not be available for marketing during the marketing year. The amount so stored may be marketed in subsequent years in which no quotas are in effect, or to fill the quota established for any subsequent year. The statute even provides that loans will be made on wheat so stored. See pages 27–28, *supra*.

But even if true, appellee's characterization of the wheat quota system as a regulation of production would not prove it to be invalid. The power of Congress extends to intrastate activities "which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means of"[10] protection, or effective regulation, of interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel*

[10] *United States* v. *Wrightwood Dairy Co.*, No. 744, decided February 2, 1942.

Corp., 301 U. S. 1; *United States* v. *Darby*, 312 U. S. 100; *United States* v. *Wrightwood Dairy Co.*, No. 744, decided February 2, 1942; *Cloverleaf Butter Co.* v. *Patterson*, No. 28, decided February 2, 1942. *United States* v. *Darby* demonstrates the validity of direct regulation of production as an appropriate means of excluding from commerce commodities produced under conditions thought to be undesirable; it was there held that Congress could regulate wages and hours in factories producing for commerce. Certainly, on the same theory, valid control of the amount of a commodity to be shipped in commerce may be effectuated by regulation of the amount produced, for the amount produced may, as here, have a substantial and direct effect upon interstate movements.

As the stipulated record indicates and as would in any event be obvious, the amount produced also has an equally substantial effect upon the price of wheat sold in interstate commerce. Price is largely determined by the balance of supply and demand (R. 67–72). The supply of wheat "is made up of production and carry-over" (R. 67), and carry-over, of course, is a factor dependent upon the relation between production and demand in previous years. Certainly the amount of wheat produced substantially affects the interstate price of wheat, probably in the long run to a greater extent than the intrastate transactions in grain futures, regulation of which, because of its effect

on wheat prices, was upheld in *Chicago Board of Trade* v. *Olsen*, 262 U. S. 1. It can be said of the quantity produced, as of such sales, that, if it "affect[s] the country-wide price of" wheat, it "directly affect[s] the country-wide commerce in it." (*Id.* at 40.)[11]

The present Act does not go as far, however, as to regulate production; the quota system applies to wheat only when it becomes available for marketing. Although the quotas are, for practical reasons,[12] based on acreage, the penalties do not apply to wheat which is stored and thereby insulated from the market. Wheat not thus insulated can be thrown on the market, and whether it is ultimately marketed or consumed on the farm, it becomes an integral part of the national supply available and actually used for all purposes. This supply and its use has a substantial effect on the interstate price, irrespective of the quantity finally marketed.

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[11] See also *Standard Oil Co.* (*Indiana*) v. *United States*, 283 U. S. 163, 169; *Coronado Co.* v. *U. M. Workers*, 268 U. S. 295; *United States* v. *Patten*, 226 U. S. 525; *Swift and Company* v. *United States*, 196 U. S. 375, 397; *United States* v. *Trenton Potteries*, 273 U. S. 392.

[12] Farmers cannot tell at the time of planting how great a quantity of any crop will be produced. Thus they cannot make the amount grown conform to a farm marketing quota fixed in terms of bushels or pounds without regard to acreage planted. This difficulty disappears if such quota is at least, the amount of wheat produced on an acreage allotment.

We submit that, because of the relationship of all wheat available for marketing to price and the position of such wheat as an integral part of the national supply available for use on or off the farm, Congress reasonably concluded that the beneficial purposes of the statute could best be achieved if the quota system applied to all wheat available for marketing and not merely to that which was actually sold.

In addition, administrative problems arising out of the manner in which wheat is marketed require the inclusion of wheat used on the farm within the wheat marketing quota regulation.

As has been pointed out, wheat, as distinguished from tobacco, is marketed by over a million farmers through almost innumerable outlets. "From the time wheat leaves the producer it usually cannot be traced as an individual shipment into the principal market channels" (R. 49). "This diversified disposition of the farm production of wheat and the various methods of marketing make it difficult accurately to account for the actual amount, as well as the final disposition, of an individual farmer's wheat production" (R. 50). As a consequence, enforcement of marketing quotas would be extremely difficult if dependent upon the ability of the Government to trace every sale by all farmers subject to the law.

If the quota system applied only to wheat actually sold and not also to the amount used on the

farm, the enforcing agency would have to know the total quantity disposed of by each farmer through all of the possible outlets in order to determine whether he was complying. To obtain such information it would be necessary to check every farm or business outlet. With more than a million farmers and thousands of marketing outlets to police in this fashion, the resulting administrative task would be well nigh impossible.

The type of regulation provided in the present Act obviates this difficulty. All that need be known is the acreage planted by the farmer and the normal yield per acre, figures which are commonly known to or easily ascertainable by the local committee or the agents of the Department.[13] If a producer plants excess acreage, the normal yield of that acreage constitutes the excess over his quota, unless he proves the actual yield of such acreage to have been less, in which case the latter figure prevails.[14] Penalties are to be paid on all of the excess not stored or delivered to the Secretary, and the farmer can market none of his wheat until such penalties are paid.

The importance of these administrative considerations and the necessity for this particular means of regulation appear from the manner in which

[13] The number of acres planted can be determined by measurement of the farm at any time during the growing season.

[14] The amendment of December 26, 1941, added a provision immaterial in this case. See p. 8, n. 2, *supra*.

Congress has altered the statutory scheme in order to make it workable. Under the original Act of 1938 the individual farm marketing quota was based on the normal production of a stated percentage of the allotted acreage, and the penalty applied to all wheat sold in excess of this quota. Enforcement of this plan would have required the policing of all wheat producers or their marketing outlets to be certain that they did not sell more than their quotas without paying the penalty.

The amendment of July 26, 1939, fixed the individual producer's marketing quota at the actual or normal production of the allotted acreage, whichever was greater, and penalized the marketing of any excess. This would have facilitated enforcement since all producers who planted only their allotted acreage would have had no excess. It would have been necessary under this provision, however, to determine the actual production of each farmer who planted excess acreage in order to ascertain his marketing quota; and it still would have been necessary to police all producers who planted excess acreage or their marketing outlets in order to prevent them from marketing wheat produced from the excess acres without paying the penalty. This likewise was not feasible.

The difficulty was finally eliminated by the amendment of May 26, 1941. Under these provisions the marketing quotas and penalties can be readily enforced. For reasons previously stated,

supra, pp. 46–47, the excess wheat of each producer which is available for marketing can be easily ascertained, and there is no necessity for seeking to determine the amount which a producer actually markets.

That an object of the May 1941 amendment was to facilitate enforcement of the quota system appears clearly from the reports of both the House and Senate Committees. Senate Report No. 143, 77th Cong., 1st Sess., states:

> After considering the regulations which will be needed in the administration of the corn and wheat-marketing quota programs for the 1941–42 marketing year in the event that quotas become effective for that year, the Department of Agriculture has advised this committee that the enforcement of the present provisions of the Agricultural Adjustment Act of 1938 will be extremely difficult. Under the present provisions of the act, the farm-marketing quota for corn or wheat is the actual production or the normal production, whichever is the larger, of the farm acreage allotment. It will be almost impossible to determine the actual production of corn or wheat produced on a farm, particularly where the producer is not participating in the farm program. The problem is also complicated by the fact that the marketing of corn or wheat as defined in the act includes the feeding to poultry or livestock which, or the products of which, are sold, bartered, or exchanged, or are to be so

disposed of. The proposed joint resolution (S. J. Res. 60) is designed to simplify the administration of marketing quotas on corn and wheat and to enable farmers to make the quotas more effective in accomplishing the purpose of the act.

* * * * *

The redefining of the farm-marketing quota is for the purpose of eliminating the necessity of determining the actual production of wheat or corn on each farm.

* * * * *

The resolution in effect provides for the determination of a farm-marketing excess and puts the penalty on this excess of the commodity regardless of whether it is actually marketed, thereby making unnecessary the determination of the actual production of the commodity on the farm.

House Report No. 364, 77th Cong., 1st Sess., states:

It has become apparent that certain changes are needed in the farm marketing quota provisions of the Agricultural Adjustment Act of 1938, as amended, relating to corn and wheat, if marketing quotas should become effective for those commodities for the 1941–42 marketing year. The proposed resolution is designed to simplify the administration of marketing quota programs on corn and wheat and to enable farmers to make the quotas more effective in accomplishing the purposes of the act.

* * * * *

> The resolution, in effect, provides for the determination of a farm marketing excess on corn and wheat and puts the marketing penalty on this excess of the commodity, regardless of whether it is actually marketed, thereby making unnecessary the determination of the actual production and the actual marketings of the commodity on the farm.

These explanations of the changes in the statute demonstrate that the May 1941 amendment was designed to insure the enforceability of the original plan to keep an excessive quantity of wheat out of the channels of commerce, not to convert the statute from a regulation of marketing to one of production.

It has repeatedly been recognized that the Constitution allows Congress to choose the means which it deems most appropriate for the carrying out of the powers entrusted to the Federal Government. *United States* v. *Darby*, 312 U. S. 100, 117–121, and cases cited, and *United States* v. *Wrightwood Dairy Co.*, No. 744, decided February 2, 1942. Certainly Congress is not limited to the use of ineffective means or those difficult of enforcement.

"Congress, having by the present Act adopted the policy of excluding from interstate commerce" an excessive supply of wheat, "it may choose the means reasonably adapted to the attainment of the permitted end, even though they involve control of intrastate activities. Such legislation has often been sustained with respect to powers, other

than the commerce power granted to the national government, when the means chosen, although not themselves within the granted power, were nevertheless deemed appropriate aids to the accomplishment of some purpose within an admitted power of the national government. See *Jacob Ruppert, Inc.* v. *Caffey*, 251 U. S. 264; *Everard's Breweries* v. *Day*, 265 U. S. 545, 560; *Westfall* v. *United States*, 274 U. S. 256, 259. As to state power under the Fourteenth Amendment, compare *Otis.* v. *Parker*, 187 U. S. 606, 609; *St. John* v. *New York*, 201 U. S. 633; *Purity Extract & Tonic Co.* v. *Lynch*, 226 U. S. 192, 201–202. A familiar like exercise of power is the regulation of intrastate transactions which are so commingled with or related to interstate commerce that all must be regulated if the interstate commerce is to be effectively controlled. *Shreveport Case*, 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563; *United States* v. *New York Central R. Co.* [272 U. S. 457], 464; *Currin* v. *Wallace*, 306 U. S. 1; *Mulford* v. *Smith, supra.* Similarly Congress may require inspection and preventive treatment of all cattle in a disease infected area in order to prevent shipment in interstate commerce of some of the cattle without the treatment. *Thornton* v. *United States*, 271 U. S. 414. * * * Congress in the exercise of its power to require inspection and grading of tobacco shipped in interstate commerce may compel such inspection and grading of all tobacco

sold at local auction rooms from which a substantial part but not all of the tobacco sold is shipped in interstate commerce. *Currin* v. *Wallace, supra,* 11, and see to the like effect *United States* v. *Rock Royal Co-op., supra,* 568, note 37." *United States* v. *Darby,* 312 U. S. 100, 121–122.

The Court has even more recently indicated that Congress may subject the entire process of manufacturing renovated butter to federal supervision, including inspection of factories and materials, for the purpose of preventing the shipment of unwholesome butter in interstate commerce. *Cloverleaf Butter Co.* v. *Patterson,* No. 28, decided February 2, 1942.

In *Mulford* v. *Smith,* this principle was given effect in connection with the regulation of intrastate marketing under the very statute involved in this case. But intrastate marketing stands in no better position than other intrastate conduct, insofar as the exercise of the commerce power is concerned. In the *Mulford* case the regulation of intrastate sales was upheld, not because such sales constituted marketing but rather because such regulation was necessary to accomplish the valid object of the act in regulating the quantity to flow in interstate commerce. The same principle applies here. The penalty upon all excess wheat available for marketing, no matter to what use it may be put, is necessary to the effective regulation of interstate commerce.

III

THE ACTION MAY NOT BE MAINTAINED AGAINST THE APPELLANTS WHO ARE MEMBERS OF THE COUNTY AND STATE COMMITTEES

In addition to the Secretary of Agriculture, the individuals composing the County Agricultural Conservation Committee for Montgomery County, Ohio, and another individual, Dale Williams, alleged to be the Chairman of the State Agricultural Conservation Committee for Ohio (hereinafter referred to as "committee members") were made defendants in this suit. They filed a motion to dismiss the complaint on the ground, among others, that they have no power or authority, either as individuals or as members of the county and state agricultural conservation committees, to enforce the wheat marketing quota provisions of the Act or to require the appellee to do or to refrain from doing anything whatsoever (R. 10). The court below overruled the motion (R. 103). We submit that this ruling was plainly erroneous.[15]

[15] Inasmuch as the Secretary is a party to this suit, the ruling on the motion is of no practical significance in this case alone. However, over thirty cases have been filed by producers against local county committees and are now pending in various districts. In most of these cases the Secretary of Agriculture is not named as a defendant. In those cases where the Secretary has been named as a defendant, he has either been dismissed for lack of proper venue or has pending a motion for such dismissal. The question is, therefore, of considerable importance not only to the Government but to the courts where these cases are pending. Furthermore, the point is the sole question presented in *Beckman* v. *Mall*, D. Kan., decided April 2, 1942, appeal to this Court allowed April 6, 1942.

It is axiomatic that a court of equity has no jurisdiction to grant injunctive relief against persons who are powerless to injure the complainant. A cursory examination of the powers and duties of the committee members reveals that nothing which they could do under the Act and the regulations issued pursuant thereto could affect the appellee if he chose to disregard the regulatory scheme. Section 388 (a) of the Act authorizes the Secretary to avail himself of the services of such agencies. The Act and the regulations issued by the Secretary of Agriculture [16] authorize the committee members: (a) To assemble accurate information with respect to wheat farms in Montgomery County, Ohio; (b) to make, on the basis of such data, certain computations in accordance with regulations issued by the Secretary of Agriculture; (c) to determine initially, in accordance with regulations issued by the Secretary, and to notify producers of, the acreage allotments, normal yields and farm marketing quotas established under the Act; (d) to issue the prescribed marketing cards in accordance with regulations issued by the Secretary of Agriculture; and (e) to receive moneys tendered to them in payment of penalties incurred under the statute, and to remit such moneys to the Secretary.

It is obvious that the committee members perform purely administrative functions and have

[16] "Wheat—507. Regulations Pertaining to Wheat Marketing Quotas for the 1941 Crop of Wheat." 6 Fed. Reg. 2695–2705, 3465–3467, 4626.

nothing to do with the enforcement of the statute. Any penalty against the appellee for failure to comply must be enforced by the Attorney General and the District Attorneys on request of the Secretary of Agriculture. Section 376 of the Act provides in part:

> If and when the Secretary shall so request, it shall be the duty of the several District Attorneys in their respective Districts, under the direction of the Attorney General, to institute proceedings to collect the penalties provided in this title.

In view of the inability of the committee members to enforce the scheme of regulation, it is immaterial whether they be considered as an independent agency aiding in the administration of the statute or as subordinates of the Secretary, who alone has some part in the enforcement of the Act. If they are regarded as having the status of an independent agency, this case is governed by the decision in *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160, in which this Court held that no suit for injunction would lie against the Federal Trade Commission to prohibit it from ordering a corporation to submit reports because such orders were only enforceable by the Attorney General. See also *California* v. *Latimer*, 305 U. S. 255, 260–261. On the other hand, if the committee members are to be regarded as subordinates of the Secretary, the Secretary must, as is true in this

case, be a party to the suit (see *Gnerich* v. *Rutter*, 265 U. S. 388, and *Webster* v. *Fall*, 266 U. S. 507), and these subordinates, as well as all other subordinates who have no share in the Secretary's enforcement duties, would not be proper additional parties." In either event the suit should have been dismissed against the committee members.

In two recent cases arising under this statute district courts have sustained motions to dismiss filed on behalf of persons having the same status as the committee members. *Hawthorne* v. *Fisher*, 33 F. Supp. 891 (D. C. N. D. Tex.); *Beckman* v. *Mall*, D. Kansas, decided April 2, 1942, appeal to this Court allowed April 6, 1942. In the latter case Circuit Judge Phillips, speaking for the majority of the court, said:

> It now appears, and it seems to me, that the only authority that a local committee has with respect to penalty is to receive the amount of the penalty if tendered by a wheat farmer, and remit it to the state committee which in turn will remit it to the Treasury or, in the event a penalty is not paid, to report the fact that a penalty has been incurred and that it has not been paid to the Secretary of Agriculture, in order that the Secretary of Agriculture may take steps if

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[11] We do not believe that the decision in *Colorado* v. *Toll*, 268 U. S. 228, is contrary to this proposition. From the report it appears that in that case the subordinate who was held subject to suit even in the absence of his superior had power to enforce the regulations by affirmative action.

> he be so advised to bring legal proceedings to enforce the payment of the penalty. That duty is vested in the local committee under section 711 of the regulations pertaining to wheat marketing quotas for the 1941 crop of wheat, issued May 31st, 1941, entitled or designated as "Wheat—507." So far as the proof shows the local committees are not taking any affirmative steps to enforce the penalties or otherwise taking any affirmative action against the nonpaying wheat farmer against whom the penalty has been found to exist, and that there is no relief that the Court can grant against the local committees, I mean state, county and township committees, that will avail the plaintiffs anything in this case.

The same ruling has been repeatedly made in cases brought against subordinate agencies set up to assist the Secretary of Agriculture in the administration of the Agricultural Marketing Agreement Act of 1937, and its antecedent the Agricultural Adjustment Act of 1933.[18]

Appellee's attempt to maintain this suit against the committee members is not strengthened by his prayer for a declaratory judgment. Such relief would be inappropriate as against the committee

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[18] *Yarnell* v. *Hillsborough Packing Co.*, 70 F. (2d) 435 (C. C. A. 5); *Massachusetts Farmers Defense Committee* v. *United States*, 26 F. Supp. 941 (D. C. D. Mass.); *Beranek* v. *Wallace*, 25 F. Supp. 841 (D. C. N. D. Ind.); *United States* v. *Western Fruit Growers*, 34 F. Supp. 794 (D. C. S. D. Calif.).

members because they have no "adverse legal interests" with respect to the appellee and there can be no "actual controversy" between the appellee and the committee members. A declaratory judgment can only be granted in a case where it is conceivable that the parties may be reversed and the existing defendant may become a plaintiff against the existing plaintiff as a defendant."[19] Such a situation can never arise here because the committee members have no authority to institute any action for enforcement of the statute against the appellee.

The fact that the Secretary has elected to defend the case on the merits does not affect the right of the committee members to be dismissed. His presence in the case does not give rise to any additional case or controversy between appellee and the committee members. They are neither necessary nor proper parties under the Federal Rules of Civil Procedure and they would not have been such under the former equity rules. They are clearly not persons "who ought to be parties if complete relief is to be accorded between those already parties." See Federal Rules of Civil Procedure, Rule 19 (b). The injunction granted against the Secretary by the lower court, if sustained, affords full relief to the appellee. To include in such

[19] *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 239–241; *Muskrat* v. *United States*, 219 U. S. 346, 357, 359; Cf. *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 261.

injunction these committee members, who clearly have no power to do the things enjoined, is manifestly unnecessary, improper, and without foundation in law or in equity.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the court below should be reversed and the complaint dismissed.

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APRIL 1942.

APPENDIX

Information for the Press

Release—Immediate.

UNITED STATES DEPARTMENT OF AGRICULTURE,
Washington, D. C., May 27, 1941.

U. S. D. A. GEARING WHEAT PROGRAM TO COMPLY WITH S. J. RES. 60

The Department of Agriculture announced today that the 1941 A. A. A. wheat program is being geared to comply with provisions of Senate Joint Resolution No. 60, signed today by President Roosevelt. The new legislation affects all of the five basic commodities. It applies immediately to wheat as a result of the recent wheat marketing quota proclamation and the wheat quota referendum set for May 31.

Under the new legislation, 1941 commodity loan rates for wheat, cotton, corn, rice, and tobacco will average 85 percent of parity. The parity price of wheat was $1.14 on April 15. The terminal and country loan rates for wheat will be announced in a few days. The wheat loan, which will average 85 percent of parity, cannot be offered if wheat growers reject marketing quotas in their referendum May 31. Loan rates for the other basic crops will be announced later.

S. J. Res. 60 also makes these major changes in the marketing quota provisions of the Agricultural

Adjustment Act: (1) exempts from quotas all corn or wheat farms on which the acreage planted to the commodity is 15 acres or less; (2) places the marketing quota penalty at 50 percent of the basic loan rate offered cooperators; (3) makes the entire crop on farms that have a marketing excess subject to an automatic Government lien until the excess has been taken care of; and (4) defines the corn and wheat marketing quota for a farm as the actual production of the acreage of the commodity on the farm less the normal or actual production, whichever is smaller, of the acreage planted to the commodity in excess of the farm acreage allotment.

As under previous legislation, the loans that will be offered in accordance with the resolution are dependent upon approval in a referendum on marketing quotas in cases where a quota is proclaimed. Cotton and tobacco farmers have already approved quotas for the current crop and no quotas will be proclaimed for either of the corn or rice crops in 1941. Wheat farmers will vote May 31 on whether or not quotas will be applied to this year's crop.

Under the wheat marketing quota provisions as now amended, all farmers except those who have 15 acres or less of wheat or whose normal production on the acreage planted to wheat is less than 200 bushels will be subject to the quota and will be eligible to vote in the May 31 referendum.

All persons who are entitled to share in the proceeds of the 1941 wheat crop on such a farm as owner, landlord, tenant, or sharecropper are eligible to vote, but no individual, partnership, corporation, association, or other legal entity is entitled to more than one vote, even though engaged in produc-

tion of wheat on two or more farms, or in two or more communities, counties, or States.

Arrangements are being made by A. A. A. committees for holding the referendum May 31 in every wheat-growing community in the United States. Three resident wheat farmers appointed by the local county A. A. A. committee will be in charge of each polling place where eligible wheat farmers will have the opportunity of casting a secret ballot.

An eligible farmer who is unable to visit the polling place in the county where his farm is located may obtain a ballot from any county A. A. A. committee and may cast his ballot by signing his name to the ballot and mailing it to the A. A. A. committee in the county in which his farm is located. Any such ballot voted by mail must reach its destination by 8:30 a. m., Monday, June 2. No voting by proxy or agent is permitted.

If the quota is approved in the referendum, all farmers may continue to sell or feed all they produce on their acreage allotment plus any old wheat carried over from previous crops. Only the normal or actual production, whichever is less, of the acreage in excess of the farm allotment is subject to penalty.

The farmer who has such a marketing excess may dispose of it in one of three ways: (1) he may market it and pay the penalty, which is 50 percent of the basic loan rate, (2) he may deliver it to the Secretary of Agriculture through his local A. A. A. committee, and (3) he may store it under bond.

If the wheat is sealed in storage approved for Government loans he will be eligible for a loan on it at 60 percent of the regular loan rate. Wheat delivered to the Secretary will become the property

of the Government and will be used for relief and other purposes that will divert it from the normal channels of trade.

"This action by Congress and the President," Secretary of Agriculture Claude R. Wickard said in commenting on the new amendments, "further strengthens a program that, taking wheat as an example, has enabled farmers for three years to maintain their return well above the world level, and that for 1941 can assure wheat farmers a larger income than they have received from any crop in 14 years.

"As a result of the legislation farmers will find the wheat quota provisions more effective and workable. The combination of the quota, acreage allotment, and the higher loan rate is most important now to the wheat farmer as he feels more and more the effects of a world at war. With this program he is better prepared to protect his income from the weight of a big surplus while at the same time holding adequate reserves in safe storage.

"As has been Farm Program policy since 1933, application of the program remains in the farmers' hands, and because of the importance of the decision I call upon all farmers who would be affected by the quota to vote at their community polls on May 31."

U. S. GOVERNMENT PRINTING OFFICE: 1941